No. 97-889 (9)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CEASAR WRIGHT,

Petitioner,

v.

UNIVERSAL MARITIME SERVICE CORP., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

RAY P. MCCLAIN
ATTORNEY AT LAW
Counsel of Record
38 Broad Street, 3rd Floor
Post Office Box 608
Charleston, SC 29402
(843) 577-3170

ELAINE R. JONES
Director-Counsel
THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
NAACP LEGAL DEFENSE AND
EDUCATIONAL FUND, INC.
99 Hudson Street, Suite 1600
New York, NY 10013
(212) 219-1900

Attorneys for Petitioner

CHARLES A. EDWARDS
Counsel of Record
WOMBLE CARYLE SANDRIDGE &
RICE, PLLC
Post Office Box 831
Raleigh, NC 27602
(919) 755-2100

Attorneys for Respondents

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RELEVANT DOCKET ENTRIES

United States District Court for the District of South Carolina, Charleston Division

1/19/96	1	COMPLAINT; FILING FEE $120.00 RECEIPT #200-3411. Scheduling order due by 3/19/96 Service due by 5/18/96 for SC Stevedores Assoc, for Ceres Marine, for Strachan Shipping, for Ryan-Walsh Inc., for Stevedoring Services, for Stevens Shipping, for Universal Maritime (jwol) [Entry date 01/22/96]
2/28/96	9	ANSWER to Complaint by defendant Universal Maritime, defendant Stevens Shipping, defendant Stevedoring Services, defendant Ryan-Walsh Inc, defendant Strachan Shipping, defendant Ceres Marine, defendant SC Stevedores Assoc (Attorney Dennis J. Rhoad) (kwhi) [Entry date 02/29/96]
5/3/96	13	MOTION by plaintiff Ceasar Wright for partial summary judgment (mpas) [Entry date 05/06/96]
5/3/96	14	MEMORANDUM by plaintiff Ceasar Wright in support of [13-1] motion for partial summary judgment (mpas) [Entry date 05/06/96]
5/3/96	15	MOTION by all defendants' for summary judgment (mpas) [Entry date 05/06/96] [Edit date 05/06/96]

5/3/96	16	MEMORANDUM by all defendants'[sic] in support of [15-1] motion for summary judgment (mpas) [Entry date 05/06/96]
5/3/96	17	Stipulation documents by plaintiff Ceasar Wright, defendant Universal Maritime, defendant Stevens Shipping, defendant Stevedoring Services, defendant Ryan-Walsh Inc, defendant Strachan Shipping, defendant Ceres Marine, defendant SC Stevedores Assoc (mpas) [Entry date 05/06/96]
5/17/96	18	MEMORANDUM by defendant Universal Maritime in opposition to [13-1] motion for partial summary judgment (mpas)
5/20/96	19	RESPONSE by plaintiff Ceasar Wright to [15-1] motion for partial summary judgment (mpas)
5/20/96	20	STATEMENT by plaintiff Ceasar Wright in opposition to [15-1] motion for summary judgment (mpas)
5/20/96	21	STATEMENT OF MATERIAL FACT[S] NOT IN DISPUTE by plaintiff Ceasar Wright (mpas)
5/20/96	22	DECLARATION by plaintiff Ceasar Wright Re: [15-1] motion for summary judgment (mpas)
5/22/96	--	Motion hearing re: under advisement Report and Recommendation to be issued within 10 days [15-1] motion for summary

		judgment, under advisement Report and Recommendation to be issued within 10 days [13-1] motion for partial summary judgment, Pending not resolved [10-1] motion to compel discovery Motion hearing held before USMg Judge Robert S. Carr/Gilbert O'Brien, ESR (mpas) [Entry date 05/23/96] [Edit date 05/23/96]
6/14/96	24	ORDER, for report and recommendations that action be dismissed without prejudice for want of jurisdiction (signed by Magistrate Judge Robert S. Carr) (mpas)
6/27/96	26	MEMORANDUM [OBJECTIONS] by plaintiff Ceasar Wright in opposition to [24-1] order for report and recommendations regarding summary judgment; that action be dismissed without prejudice for want of jurisdiction (mpas) [Entry date 06/28/96]
6/27/96	27	MEMORANDUM by plaintiff Ceasar Wright in opposition to Report and recommendation on cross motions for summary judgment filed 6/17/96 (mpas) [Entry date 06/28/96]
7/9/96	29	REPLY by defendants, Universal Maritime, Stevens Shipping, Stevedoring Services, Ryan-Walsh Inc, Strachan Shipping, Marine to Plaintiff's objections to Report and Recommendation of Magistrate Judge (rnie)
9/27/96	30	ORDER adopting the Magistrate's Report and Recommendation; granting [15-1]

motion for summary judgment (signed by Judge David C. Norton (mpas) [Entry date 10/02/96]

10/2/96 31 JUDGMENT for defendant Universal Maritime, defendant Stevens Shipping, defendant Stevedoring Services, defendant Ryan-Walsh Inc, defendant Strachan Shipping, defendant Ceres Marine, defendant SC Stevedores Assoc against plaintiff Ceasar Wright; adopting the Magistrate Report and Recommendation (mpas)

10/2/96 -- Case closed (mpas)

10/11/96 32 MOTION by plaintiff Ceasar Wright to vacate [31-1] judgment order to reconsider order granting summary judgment (mpas) [Entry date 10/15/96]

10/25/96 34 MEMORANDUM by defendant Universal Maritime, defendant Stevens Shipping, defendant . Stevedoring Services, defendant Ryan-Walsh Inc, defendant Strachan Shipping, defendant Ceres Marine, defendant SC Stevedores Assoc in opposition to [30-1] order; and to plaintiff's motion to vacate judgment (mpas)

10/31/96 35 REPLY MEMORANDUM by plaintiff Ceasar Wright to [32-1] motion to vacate [31-1] judgment order to reconsider order granting summary judgment (mpas) [Entry date 11/06/96]

11/6/96 -- Motion hearing re: [32-1] motion to vacate [31-1] judgment order to reconsider Order granting summary judgment at 3:00 11/19/96 (obri)

11/8/96 36 MOTION by plaintiff Ceasar Wright to conform record as to Notice of Right to Sue (Stevedoring Services of America) or add Stevedoring Services of Americas a party defendant (mpas) [Entry date 11/12/96]

11/27/96 37 MOTION with memorandum in support by plaintiff Ceasar Wright to compel arbitration and joining additional party International Longshoremen's Association and Local 1422, International Longshoremen's Association (mpas)

12/2/96 -- Oral order:MOTION HEARING HELD [32-1] motion to vacate [31-1] judgment order to reconsider Order granting summary judgment taken under advisement (by Judge David C. Norton/Gilbert O'Brien, ESR) (obri)

12/2/96 38 ORDER denying [32-1] motion to vacate [31-1] judgment order to reconsider Order granting summary judgment (signed by Judge David C. Norton) (mpas) [Entry date 12/06/96]

12/13/96 39 MEMORANDUM by defendant Universal Maritime, defendant Stevens Shipping, defendant . Stevedoring Services, defendant Ryan-Walsh Inc, defendant Strachan

Shipping, defendant Ceres Marine, defendant SC Stevedores Assoc in opposition to [37-1] motion to compel arbitration and joining additional party International Longshoremen's Association and Local 1422, International Longshoremen's Association (cmck) [Entry date 12/16/96]

12/19/96 40 NOTICE OF APPEAL by plaintiff Ceasar Wright Re: [38-1] order, [31-1] judgment order, [30-1] order Fee Status:PAID #200-4882 Transcript purchase order due on 12/29/96 (snel) [Entry date 12/20/96]

United States Court of Appeals for the Fourth Circuit

12/30/96 Civil case docketed. (wu)

1/2/97 Docketing notice issued. [96-2850] (wu)

1/6/97 Docketing statement filed by Appellant Ceasar Wright [2487903-1] T/S needed: y; T/S already on file: n [96-2850] (wu)

1/6/97 Transcript order filed for Gilbert O'Brien . [96-2850] (wu)

1/10/97 Counsel of record form filed by Ray P. McClain for Appellant Ceasar Wright. (wu)

1/10/97 Counsel of record form filed by Charles Archibald Edwards for Appellee Universal Maritime, Appellee Stevens Shipping,

Appellee Stevedoring Services, Appellee Ryan-Walsh Inc, Appellee Strachan Shipping Co, Appellee Ceres Marine Term, Appellee SC Stevedores Assoc. (wu)

1/10/97 Counsel of record form filed by Jeffrey M. Hahn for Appellee Universal Maritime, Appellee Stevens Shipping, Appellee Stevedoring Services, Appellee Ryan-Walsh Inc, Appellee Strachan Shipping Co, Appellee Ceres Marine Term, Appellee SC Stevedores Assoc. (wu)

1/23/97 Certification transcript filed in district court by Gilbert O'Brien on 01/15/97. [96-2850] (wu)

1/23/97 Briefing order filed. [96-2850] Appellant(s) brief/joint appendix due 3/4/97 for Ceasar Wright . (wu)

2/3/97 Certification of ROA complete and retained in the District Court. [96-2850] (wu)

2/25/97 Motion filed by Appellant Ceasar Wright to extend time to file appellant(s) brief/appendix until 4/3/97 [2516684-1] [96-2850] (wu)

2/26/97 CLERK ORDER FILED granting motion to ext time to file a's br/apx [2516684-1] Appellant(s) brief/joint appendix now due 3/25/97 for Ceasar Wright Conf aty recomm?: n. Number of days granted: 21. Copies to all counsel. [96-2850] (wu)

3/25/97	Brief and joint appendix filed by Appellant Ceasar Wright. Type of Service: HD Copies of brief: 8 # pages: 27 Copies of apx: 6 # pages: 284. Sufficient [Y/Nl: y 2-sided copying: y [96-2850] Appellee brief due 4/24/97 for SC Stevedores Assoc, for Ceres Marine Term, for Strachan Shipping Co, for Ryan-Walsh Inc, for Stevedoring Services, for Stevens Shipping, for Universal Maritime . (aww)
4/22/97	Brief filed by Appellee Universal Maritime, Appellee Stevens Shipping, Appellee Stevedoring Services, Appellee Ryan-Walsh Inc, Appellee Strachan Shipping Co, Appellee Ceres Marine Term, Appellee SC Stevedores Assoc. Type of Service: CD Copies: 8 # pages: 53. Sufficient [Y/N]: y. [96-2850] (aww)
5/2/97	Case tentatively calendared for oral argument Term: July Place: Chas,Bea,Wil. SUBMISSION DEADLINE: 05/12/97. (jle)
5/9/97	Reply brief filed by Appellant Ceasar Wright. Type of Service: HD Copies of brief: 8 # pages: 21. Sufficient [Y/N]: y. . [96-2850] (aww)
5/19/97	Case calendared for oral argument. [96-2850] (jc)
7/3/97	Supplemental authorities (FRAP 28(j)) filed by Appellant Ceasar Wright [2592083-1] . [96-2850] (aww)

7/7/97	Oral argument heard. Courtroom Deputy: JLE. [96-2850] (jc)
7/29/97	Unpublished per curiam opinion filed. [96-2850] (wu)
7/29/97	Judgment order filed. Decision: AFFIRMED . [96-2850] (wu)
8/5/97	Insufficient hill of costs filed by Appellee Universal Maritime, Appellee Stevens Shipping, Appellee Stevedoring Services, Appellee Ryan-Walsh Inc, Appellee Strachan Shipping Co, Appellee Ceres Marine Term, Appellee SC Stevedores Assoc. (Insufficiency: certificate of service) Remedy by: 08/12/97. [96-2850] Follow-up due 8/12/97. (wu)
8/8/97	Bill of Costs made sufficient by appellees How?: Bill of costs with certificate of service filed . [96-2850] (wu)
8/20/97	Bill of costs taxed by clerk in the amount of $ 35.10. Copies to counsel. [2617264-1] [96-2850] (wu)
8/20/97	Mandate issued. [96-2850] (wu)
12/4/97	Supreme Court notice that petition for certiorari was filed on 11/26/97. Spct No.: 97-889 Spct Pty 1: Ceasar Wright Spct Pty 2: Univ Maritime Svc Corp, et al. [96-2850] (cw)

COMPLAINT

NATURE OF THE ACTION

1. This is an employment discrimination action arising out of the employment practices of the Defendants. The Plaintiff seeks relief which includes back pay and benefits, compensatory damages, punitive damages, costs and attorney's fees. The case is brought in this Court pursuant to the provisions of the Americans with Disabilities Act, 42 U.S.C. §12101 et seq. ["the ADA"].

JURISDICTION

2. This Court has jurisdiction in this action pursuant to 28 U.S.C. §§1331, 1337 and 1343; and 42 U.S.C. §12101 et seq., especially §12117(a).

PARTIES

3. Plaintiff CEASAR WRIGHT is a male citizen of the United States and a resident of the County of Charleston, State aforesaid.

4. Defendant Universal Maritime Service Corp. (hereinafter "UNIVERSAL") is a New York corporation regularly engaging in the business of stevedoring in the Port of Charleston, South Carolina. It has offices that regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was an "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), in January, 1995, before it refused to accept him.

5. Defendant Stevens Shipping & Terminal Company (hereinafter "STEVENS") is a Georgia corporation regularly engaging in the business of

stevedoring in the Port of Charleston, South Carolina. It has offices that regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was an "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), in January, 1995, before it refused to accept him.

6. Defendant Stevedoring Services of America, Inc. (hereinafter "SSA") is a corporation regularly engaging in the business of stevedoring in the Port of Charleston, South Carolina. It has offices that regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was an "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), in January, 1995, before it refused to accept him.

7. Defendant Ryan-Walsh, Inc. (hereinafter "RYAN-WALSH"), is a Alabama corporation regularly engaging in the business of stevedoring in the Port of Charleston, South Carolina. It has offices that regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was the "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), January, 1995, before it refused to accept him.

8. Defendant Strachan Shipping Company, Inc. (hereinafter "STRACHAN") is a Delaware corporation regularly engaging in the business of stevedoring in the Port of Charleston, South Carolina. It has offices that

regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was the "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), in January, 1995, before it refused to accept him.

9. Defendant Ceres Marine Terminals, Inc. (hereinafter "CERES") is a Maryland corporation regularly engaging in the business of stevedoring in the Port of Charleston, South Carolina. It has offices that regularly conduct this business in Charleston County. Plaintiff is informed and believes that it had more than five hundred (500) employees in each of twenty or more calendar weeks in the current or preceding calendar year. It was the "employer" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), in January, 1995, before it refused to accept him.

10. Defendant South Carolina Stevedores Association, Inc. (hereinafter "the ASSOCIATION") is a South Carolina corporation. It has offices that regularly conduct this business in Charleston County. It was an "agent" of the "employers" of CEASAR WRIGHT, within the meaning of 42 U.S.C. §12111(5)(A), through the time the employers refused to accept Plaintiff in January, 1995, and continuing to the present.

STATEMENT OF FACTS

11. Plaintiff has been employed in the longshore industry since 1970. He is a member of Local 1422, International Longshoremen's Association, AFL-CIO [hereinafter Local 1422]. He has been a member of that union since 1970.

12. Local 1422 operates a "hiring hall" for stevedoring companies in the Port of Charleston.

Through the hiring hall, Local 1422 provides labor to companies, including the Defendant companies, for loading and unloading cargo on seagoing vessels, and other stevedoring work, in the Port of Charleston, State of South Carolina.

13. Through the hiring hall, Plaintiff and other longshoremen who report for work are assigned each day to work on gangs, as requested by the stevedoring employers who obtain labor through the hiring hall. Since the employers' need for labor varies from day to day, a longshoreman with substantial seniority, such as Plaintiff has, will, in the course of a month, be assigned to work for each of the Defendant companies that perform stevedoring services in the Port of Charleston.

14. On or about February 18, 1992, Plaintiff suffered a severe fracture of his right heel in the course of his employment with Defendant STEVENS.

15. In the course of his recuperation, Plaintiff's treating physician and other examining physicians expressed the view that Plaintiff would be, due to his physical impairment and disability, permanently and totally disabled from performing the duties of longshore employment.

16. Defendant STEVENS rejected the medical opinions that Plaintiff was permanently and totally disabled.

17. In May, 1994, Plaintiff entered into a settlement of a worker's compensation claim with Defendant Stevens Shipping Company that was equivalent only to a small decrease in his expected work-life prior to retirement. This settlement was approved by the Department of Labor on June 10, 1994.

18. Subsequent to July, 1994, Plaintiff's physical

condition improved.

19. Plaintiff obtained the permission of his treating physician to attempt to return to work.

20. On January 2, 1995, Plaintiff presented himself at the hiring hall of Local 1422; Plaintiff offered himself as available for work without restriction or accommodation.

21. From January 2, 1995, through January 11, 1995, Plaintiff was referred by Local 1422 to work with several stevedoring companies, including Defendants UNIVERSAL, RYAN-WALSH, STRACHAN, and CERES. Plaintiff performed all duties assigned to him by each of these employers; none of these employers complained or objected in any way to the manner in which Plaintiff performed his duties.

22. On or about January 11, 1995, Plaintiff is informed and believes, Defendants, through their representatives, met and agreed to refuse to accept future work referrals for Plaintiff from Local 1422.

23. On or about January 12, 1995, Defendants advised Benjamin Flowers, President of Local 1422, that none of the Defendants would accept Plaintiff on a work referral from Local 1422, and requested that Local 1422 cease referring Plaintiff to them for work. Local 1422 acquiesced in this request.

24. Plaintiff is informed and believes that he has been refused employment by the Defendant employers due to the employers' perception that Plaintiff is not physically able to do the job that Local 1422 referred him to do on a stevedoring gang, in spite of the fact he had performed these duties satisfactorily from January 2, 1995, through January 11, 1995, for several of the Defendants.

25. Plaintiff is informed and believes that the

Defendant employers refused to allow Plaintiff to work because he had previously been reported by physicians to be permanently disabled from longshore employment, though he subsequently received a release from his treating physician to attempt to return to longshore work.

26. Plaintiff is able to perform the essential duties of the positions for which Local 1422 would refer him for employment, without accommodation, as he had from January 2, 1995, through January 11, 1995. If any problems of performance develop in the course of Plaintiff's employment, he is informed and believes that such problems may be redressed by reasonable accommodation.

27. Therefore, Plaintiff has been discriminated against in the terms and conditions of employment by the Defendants, in violation of the Americans with Disabilities Act, 42 U.S.C. Sec. 12101 et seq..

28. As set forth hereinabove, on or about February 18, 1992, Plaintiff sustained on-the-job injuries to his heel. The injuries to his heel are permanent in nature and constitute a permanent impairment to many of his major life activities, within the meaning of the Americans with Disabilities Act. However, that impairment does not now interfere with his performance of the essential duties of his position of employment. Plaintiff is, therefore, a "qualified individual with a disability" as defined in 42 U.S.C. §12111(8), and other relevant statutes and regulations.

29. Plaintiff is informed and believes that Defendants perceived him to be substantially impaired in his ability to work by reason of his physical ailments, although this perception was no longer accurate when he returned to work in January, 1995.

30. On information and belief, the Defendants

negligently and recklessly, or willfully and intentionally, refused to allow Plaintiff to work because of their perception of his disability.

31. As a result of Defendants' refusal to accept Plaintiff on work referrals, Plaintiff has suffered loss of income, fringe benefits, retirement and other benefits and has suffered other financial loss.

32. Plaintiff is informed and believes that he will never be able to obtain substitute employment with earnings comparable to that from which he has been refused by Defendants.

33. As a result of his termination, Plaintiff has suffered pain and suffering, humiliation, anxiety, and mental and emotional distress.

CONDITIONS PRECEDENT AND EXHAUSTION OF REMEDIES

34. On January 27, 1995, Plaintiff CEASAR WRIGHT, through his attorney, mailed original sworn Charges of Discrimination to the South Carolina Human Affairs Commission and to the Equal Employment Opportunity Commission, naming the Defendants Universal Maritime, Service Corp., Stevens Shipping & Terminal Company, Inc., and Stevedoring Services of America, Inc., herein as Respondents. The said Charges asserted discrimination on the basis of physical disability or perceived impairment. [Copies of each charge are attached hereto as Exhibit A.]

35. On July 7, 1995, Plaintiff CEASAR WRIGHT, through his attorney, mailed original sworn Charges of Discrimination to the South Carolina Human Affairs Commission and to the Equal Employment Opportunity Commission, naming the Defendants South Carolina Stevedores Association, Inc., Ryan-Walsh, Inc.,

Strachan Shipping Co., Inc., and Ceres Marine Terminals, Inc., herein as Respondents. The said Charges asserted discrimination on the basis of physical disability or perceived impairment. [Copies of each charge are attached hereto as Exhibit B.]

36. On October 26, 1995, the Equal Employment Opportunity Commission issued Notices of Right to Sue to Plaintiff. This suit is brought, in a timely fashion, pursuant to those Notices of Right to Sue. [Copies of said Notices are attached hereto as Exhibit C.]

37. CEASAR WRIGHT has fully complied with all conditions precedent for jurisdiction under the Americans with Disabilities Act and other applicable law. 42 U.S.C. §12117(a).

38. Plaintiff has fully exhausted all administrative remedies required for this claim.

FOR A FIRST CAUSE OF ACTION
(Americans with Disabilities Act)

39. Plaintiff alleges and realleges the allegations contained in paragraphs 1 through 38 above with the same force and effect as though fully set forth herein.

40. By the acts and practices alleged above, and by other related acts and practices, the Defendants have violated Plaintiff's rights under the Americans with Disabilities Act, as amended, 42 U.S.C. §12112(a), in discriminating with respect to terms, conditions and privileges of employment, by refusing to accommodate his perceived impairment and instead refusing to allow him to work in the longshore industry in the Port of Charleston.

41. Defendants, acting in concert with one another, jointly and with or through Defendant ASSOCIATION, have agreed to exclude Plaintiff from

employment in the longshore industry in the Port of Charleston.

42. Defendants, acting in concert with one another, excluded Plaintiff from longshore employment, although they knew, because of his successful performance of duties from January 2 through January 11, 1995, that Plaintiff was no longer completely disabled from longshore employment.

43. Defendants, acting in concert with one another, consciously disregarded their obligations to Plaintiff under the Americans with Disabilities Act.

REMEDIES

44. The Plaintiff has no plain, adequate, or complete remedy at law to redress fully the wrongs alleged herein, and this action for permanent injunction and other relief is his only means of securing full and adequate relief. The Plaintiff is suffering and will continue to suffer irreparable injury from the Defendants' acts.

45. Based on the foregoing, Plaintiff is entitled to actual, compensatory, punitive, and other damages.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully prays that this Court enter judgment for him, and against Defendants UNIVERSAL, STEVENS, SSA, RYAN-WALSH, STRACHAN, CERES, and the ASSOCIATION, jointly and severally, as follows:

1. For back pay, in an amount to be proved at trial;

2. For the past and reasonably foreseeable future effects of discrimination upon his life and health insurance (or cost of previously insured health care costs),

pension and other employee fringe benefits, in an amount to be proven at trial;

3. Order that UNIVERSAL, STEVENS, SSA, RYAN-WALSH, STRACHAN, CERES, and the ASSOCIATION reinstate Plaintiff as eligible for hire as an employee with attendant rights and privileges as if he had been continuously employed; or, in the alternative, if reinstatement be found not to be feasible, to award front pay to him, at least through age 70.

4. For prejudgment interest on all amounts awarded as prayed herein;

5. For compensatory damages, in an amount to be proved at trial;

6. For punitive damages, in an amount to be proved at trial;

7. For the Plaintiff's costs, and reasonable attorney's fees, pursuant to all applicable provisions of law, including 42 U.S.C. §12117(a).

9. For such other and further relief as to the Court appears proper.

ANSWER OF ALL DEFENDANTS

FIRST DEFENSE

Defendants UNIVERSAL MARITIME SERVICE, CORP (hereinafter, "UNS"), STEVENS SHIPPING & TERMINAL COMPANY (hereinafter, "Stevens"), STEVEDORING SERVICES OF AMERICA (hereinafter, "SSA"), RYAN-WALSH, INC. (hereinafter, "Ryan-Walsh"), STRACHAN SHIPPING COMPANY (hereinafter, "Strachan"), CERES MARINE TERMINALS, INC. (hereinafter, Ceres"), and SOUTH CAROLINA STEVEDORES ASSOCIATION (hereinafter, "SCSA"), also collectively referred to hereinafter as "Defendants," answer the separately - numbered allegations of the Complaint of Plaintiff Ceasar Wright (hereinafter, "Plaintiff") as follows:

1. As to the allegations of Paragraph 1 of the Complaint, Defendants admit that this purports to be an employment discrimination action brought pursuant to the Americans with Disabilities Act (the "ADA") and which seeks remedies provided by the ADA, but deny that any employment practices of any of the Defendants give rise to a claim pursuant to that statute, further denying that this action is brought pursuant to the provisions of the ADA. Defendants further specifically deny that this is an "action arising out the employment practices" of Defendant SCSA, as Defendant SCSA is not an employer under the ADA.

2. Defendants admit that the Complaint alleges facts which, if true, would fall within the subject matter jurisdiction of this Court, but deny that the actions of the Defendants, or any of them, in fact constitute any violation of any federal law or regulation, including, but not limited, to the ADA.

3. Paragraph 3 of the Complaint is admitted upon

information and belief, although neither Plaintiff's gender, his citizenship, nor his residence are relevant herein.

4. The allegations of the first three sentences of Paragraph 4 of the Complaint are admitted. As to the allegations of the final sentence of that paragraph, Defendants show that Local 1422, in derogation of its obligations and responsibilities under the hiring hall provisions of the applicable collective bargaining agreement and Longshore Seniority Plan, referred Plaintiff to work with UNS in January 1995, but without so advising any of the Defendants. All allegations of the final sentence of paragraph 4 of the Complaint additional to or inconsistent with the foregoing are denied.

5. The allegations of the first three sentences of Paragraph 5 of the Complaint are admitted. As to the allegations of the final sentence of that paragraph, Defendants show that Local 1422, in derogation of its obligations and responsibilities under the hiring hall provisions of the applicable collective bargaining agreement and Longshore Seniority Plan, referred Plaintiff to work with Stevens in January 1995, but without so advising any of the Defendants. All allegations of the final sentence of Paragraph 5 of the Complaint additional to or inconsistent with the foregoing are denied.

6. The allegations of the first three sentences of Paragraph 6 of the Complaint are admitted. As to the allegations of the final sentence of that paragraph, Defendants show that Local 1422, in derogation of its responsibilities under the hiring hall provisions of the applicable collective bargaining agreement and Longshore Seniority Plan, referred Plaintiff to work with SSA in January 1995, but without so advising any of the Defendants. All allegations of the final sentence of Paragraph 6 of the Complaint additional to or

inconsistent with the foregoing are denied.

7. The allegations of the first three sentences of Paragraph 7 of the Complaint are admitted. As to the allegations of the final sentence of that paragraph, Defendants shows that Local 1422, in derogation of its obligations and responsibilities under the hiring hall provisions of the applicable collective bargaining agreement and Longshore Seniority Plan, referred Plaintiff to work with Ryan-Walsh in January 1995, but without so advising any of the Defendants. All allegations of the final sentence of Paragraph 7 of the Complaint additional to or inconsistent with the foregoing are denied.

8. The allegations of the first three sentences of Paragraph 8 of the Complaint are admitted, and the allegations of the final sentence of that paragraph are denied.

9. The allegations of the first three sentences of paragraph 9 of the Complaint are admitted, and the allegations of the final sentence of that paragraph are denied.

10. Defendants admit the allegations contained in the first two sentences of Paragraph 10 of the Complaint, and deny the remainder thereof.

11. Defendants admit Plaintiff was employed by the longshore industry prior to the date of the accident which gave rise to his claim under the Longshore and Harbor Workers' Compensation Act, but deny that he has been employed in the longshore industry since that date. Defendants admit the remaining allegations of paragraph 11 of the Complaint upon information and belief.

12. As to the allegations of Paragraph 12 of the Complaint, Local 1422 operates a "hiring hall" pursuant to

the provisions of successive collective bargaining agreements and a Longshore Seniority Plan between Local 1422 and the SCSA. The terms of those agreements speak for themselves, and all allegations of paragraph 12 of the Complaint additional to or inconsistent with the provisions of those agreements are denied.

13. While the allegations contained in Paragraph 13 of the Complaint attempt to summarize the "typical" operation of the hiring hall operated by Local 1422, Defendants deny that longshoremen who report for work are necessarily "assigned each day to work on gangs, as requested by the stevedoring employers," and that "a longshoreman with substantial seniority will, in the course of a month, be assigned to work for each of the Defendant companies that performs stevedoring services in the Port charleston," and show that varying conditions render the general description in that paragraph inapplicable to specific circumstances so as to preclude any such description from being a factual representation applicable to this action. All allegations of paragraph 13 of the Complaint additional to or inconsistent with the foregoing are denied.

14. As to the allegations of Paragraph 14 of the Complaint, without any concession that such allegations are material hereto, Defendants show that, on or about February 18, 1992, Plaintiff sustained a fracture of his right heel while in the course of service to Defendant Steven pursuant to the referral and hiring hall provisions of the then-applicable collective bargaining agreement between SCSA and Local 1422. All allegations of Paragraph 14 of the Complaint additional to or inconsistent with the foregoing are denied.

15. As to the allegations of Paragraph 15 of the Complaint, Defendants show that a panel of physicians,

acting pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), expressed the views that Plaintiff's injury to his foot, coupled with other then existing conditions, rendered him permanently and totally disabled from performing the duties of longshore employment, while making no conclusion regarding Plaintiff's ability to work in any other industry or occupation. All allegations of Paragraph 15 of the Complaint additional to or inconsistent with the foregoing are denied.

16. As to the allegations of Paragraph 16 of the Complaint, Defendants admit that Defendant Stevens initially contested Plaintiff's assertions that he was permanently and totally disabled, but further show that the full and complete settlement of such claims, pursuant to Section 8(i) of LHWCA, constituted an abandonment and waiver of that earlier-advanced position on the part of Defendant Stevens. All allegations of paragraph 16 of the Complaint additional to or inconsistent with the foregoing are denied.

17. As to the allegations of Paragraph 17 of the Complaint, on May 26, 1994, Plaintiff entered into a settlement of his LHWCA claim with Defendant Stevens, pursuant to Section 8(i) of LHWCA, representing a full and complete settlement which was intended to compensate Plaintiff for the full amount of his expected earnings through normal retirement. That sum, reduced to present value, was Two Hundred Forty Thousand and No One Hundredths Dollars ($240,000.00), which settlement and payment were freely and voluntarily accepted by plaintiff and were approved by the United States Department of Labor on June 10, 1994. All allegations of paragraph 17 of the Complaint additional to or inconsistent with the foregoing are denied.

18. Defendants are without information sufficient to admit or deny whether Plaintiff's physical condition improved "subsequent to July, 1994" but show that such alleged "improvement" was not brought to the attention of the Defendants nor was it supported by medical evidence, and that Plaintiff's acceptance of total disability benefits estops from him from proceeding further herein. All allegations of Paragraph 18 of the Complaint additional to or inconsistent with the foregoing are denied.

19. As to the artfully-pleaded allegations of Paragraph 19 of the Complaint, Defendants show, upon information and belief, that, at some time Plaintiff sought and, without further examination or consultation, obtained a release by Howard L. Brilliant, M.D., to return to full duty work, a copy of which is attached hereto as Exhibit "A," such release being totally inconsistent with the continued assertions of the same physician throughout the period during which Defendant Stevens was attempting to secure either a return to work or alternative gainful employment for Plaintiff. All allegations of Paragraph 19 of the Complaint additional to or inconsistent with the foregoing, particularly the characterization of Dr. Brilliant's certification as "permission to attempt to return to work," are denied.

20. Defendants are without information sufficient to admit or deny the allegations of Paragraph 20 of the Complaint.

21. As to the allegations of Paragraph 21 of the Complaint, Defendants show that Local 1422, in derogation of its obligations and responsibilities under the hiring hall provisions of the applicable collective bargaining agreement and Longshore Seniority Plan, referred Plaintiff to work with several stevedoring companies during the period from January 2 through January 11, 1995, being fully aware that Plaintiff had

accepted a full and complete settlement which was designed to compensate him for his alleged inability to perform any further longshore work until his expected retirement, but without so advising any of the Defendants. All allegations of Paragraph 21 of the Complaint additional to or inconsistent with the foregoing are denied.

22. As to the allegations of Paragraph 22 of the Complaint, Defendants show that, upon discovering that Plaintiff, without medical certification and having accepted a full and complete settlement for his alleged inability to work on the waterfront, had withheld such information and had presented himself for longshore employment, Defendants concluded that Plaintiff was ineligible for further consideration for employment, and so advised Local 1422. All allegations of Paragraph 22 of the Complaint additional to or inconsistent with the foregoing are denied.

23. As to the allegations of Paragraph 23 of the Complaint, Defendants show that the communication from Defendant Stevens to Benjamin Flowers, President of Local 1422, speaks for itself, and that a copy of this communication is attached hereto as Exhibit "B." Following receipt of this communication, Local 1422 made no further referrals of Plaintiff, apparently acquiesencing [sic] to Defendants' position that Plaintiff was estopped, by virtue of his prior representations and his acceptance of a full and complete settlement, to seek further longshore employment in the Port of Charleston.

24. The allegations of Paragraph 24 of the Complaint are denied.

25. The allegations of Paragraph 25 of the Complaint are denied.

26. Defendants are without information sufficient

to admit or deny the allegations of Paragraph 26 of the Complaint. However, by virtue of Plaintiff's prior representations to the contrary, and his acceptance of a full and complete settlement in lieu of his return to work, the allegations of Paragraph 26 of the Complaint are irrelevant.

27. The allegations of Paragraph 27 of the Complaint are denied.

28. As to the allegations of Paragraph 28 of the Complaint, Defendants show that the injuries to Plaintiff's heel were not the only injuries and/or conditions which were addressed in his claims for, and settlement of, his compensation in lieu of further longshore employment. All allegations of Paragraph 28 additional to or inconsistent with the foregoing are denied.

29. The allegations of Paragraph 29 of the Complaint are denied.

30. The allegations of Paragraph 30 of the Complaint are denied.

31. The allegations of Paragraph 31 of the Complaint are denied. Additionally, having accepted a full and complete settlement in lieu of his loss of income, fringe benefits, retirement and other benefits, Plaintiff is estopped further to proceed herein. Moreover, Defendant are informed and believe that Plaintiff need only apply for pension and welfare benefits which are available to him through a collectively-bargained health and welfare plan, and such claims are virtually certain to be granted, so that Plaintiff's failure to do so constitutes a failure to exercise reasonable efforts to mitigate his damages. Finally, Defendants are informed and believe that Plaintiff is currently receiving social security disability benefits from the Social Security Administration, the receipt of which is a further basis for denial of any relief

herein.

32. As to the allegations of Paragraph 32 of the Complaint, Defendants show that it is Plaintiff's lack of education and literacy, rather than his physical condition, which precludes him from alternative employment, and that such factors were known to and considered by him in his free and voluntary acceptance of a full and complete settlement as hereinabove described.

33. The allegations of Paragraph 33 of the Complaint is denied.

34. The allegations of Paragraph 34 of the Complaint are denied.

35. The allegations of paragraph 35 of the Complaint are denied, in that Defendants are informed and believe that the charges against SCSA, Ryan-Walsh, Strachan, and Ceres were untimely filed, and in that the date of mailing of said charges is irrelevant. Defendants further show that the Equal Employment opportunity Commission stamped "Received" on these four charges on July 26, 1995, more than 180 days following the events complained of.

36. The allegations of Paragraph 36 of the Complaint are denied.

37. The allegations of Paragraph 37 of the Complaint are denied.

38. The allegations of Paragraph 38 of the Complaint are denied.

39. Defendants allege and reallege the answers and objections contained in Paragraphs 1 through 38 above as if fully set forth herein.

40. The allegations of Paragraph 40 of the Complaint are denied.

41. The allegations of Paragraph 41 of the Complaint are denied.

42. The allegations of Paragraph 42 of the Complaint are denied.

43. The allegations of Paragraph 43 of the Complaint are denied.

44. The allegations of Paragraph 44 of the Complaint are denied.

45. The allegations of Paragraph 45 of the Complaint are denied.

46. The remainder of the Complaint consists of prayers for relief which require neither admission nor denial. However, to the extent that said prayers imply, or might lead the reader to infer, that the Defendants have violated any duty with respect to Plaintiff, have engaged in any wrongful act or omission with respect to Plaintiff, or are in any manner liable to Plaintiff, said implications and inferences are denied.

SECOND DEFENSE

This Court lacks both personal and subject matter jurisdiction over Defendant SCSA by virtue of its lack of capacity as an "employer" or "agent" as those terms are defined in the Act, in that SCSA has fewer than fifteen (15) employees, as defined in 42 U.S.C. § 12111(5)(A), and is not an "agent" within the meaning of that provision.

THIRD DEFENSE

Plaintiff has deliberately, willfully, and/or negligently failed to exhaust the adequate remedies and procedures afforded him under the collective bargaining agreement between Local 1422 and SCSA, on behalf of its constituent members, as well as the remedies provided under the Longshore Seniority Plan.

FOURTH DEFENSE

Further answering and as an affirmative defense, Defendants show that Plaintiff is not, nor has he been at any time material hereto, "substantially limited in one or more of his major life activities" so as to be "impaired" within the meaning of the ADA, in that, while Plaintiff is estopped further to proceed herein, it is his education and literacy, rather than any physical limitations, which interfere with his ability to secure other employment.

FIFTH DEFENSE

By his actions, including his acceptance of a full and complete settlement in lieu of all further longshore employment, Plaintiff is estopped from asserting his claim in this action and from proceeding further herein.

SIXTH DEFENSE

Plaintiff's claims are barred by accord and satisfaction.

SEVENTH DEFENSE

Defendants' actions with respect to Plaintiff were for reasons other than his alleged disability, thereby constituting a complete defense pursuant to 42 U.S.C. § 2000e-5(g)(2)(A), as made applicable to the ADA by 42 U.S.C. § 12117(a).

EIGHTH DEFENSE

Plaintiff, having applied for and having continued to receive social security disability benefits, is estopped from asserting his claim in this action and from proceeding further herein.

NINTH DEFENSE

By his actions and prior representations, Plaintiffs has waived his ability to claim that he is able to perform

the essential functions of the positions he now alleges he is able to perform.

TENTH DEFENSE

Plaintiff has not sought, nor is he entitled to, any "reasonable accommodation" as that term is defined in the ADA.

ELEVENTH DEFENSE

Local 1422 has repeatedly stated that there is no such thing as "light duty" work in any employment covered by the collective bargaining agreement between Local 1422 and SCSA. Consequently, Plaintiff's own collective bargaining representative contends that any attempt at reasonable accommodation by an employer member of SCSA would be unavailing because it would constitute the recognition of a "myth" with which Local 1422 will not agree.

TWELFTH DEFENSE

Plaintiff's charges against SCSA, Ryan-Walsh, Strachan and Ceres were untimely filed, and there is no basis in law or in fact sufficient to provide an excuse for Plaintiff's failure to comply with the jurisdictional prerequisites of 42 U.S.C. § 2000e-5(1), as made applicable to the ADA in 42 U.S.C. § 12116(a).

THIRTEENTH DEFENSE

Plaintiff's assertion of claims herein constitutes a fraud on the court, in that Plaintiff is attempting to secure a double recovery in derogation of a settlement fully and voluntarily agreed to and accepted by him.

FOURTEENTH DEFENSE

Plaintiff has unreasonably failed to mitigate his damages as required by law.

FIFTEENTH DEFENSE

Defendant UNS has not been served with the Summons and Complaint.

WHEREFORE, having fully answered, Defendants pray that the Complaint be dismissed with prejudice and denied, and that Defendants receive their costs and reasonable attorneys' fees herein.

EXHIBIT
A

WEST ASHLEY ORTHOPAEDIC CLINIC, P.A.
HOWARD L. BRILLIANT, M.D.
1249 SAVANNAH HIGHWAY
CHARLESTON, SOUTH CAROLINA 23407
TELEPHONE 571-5152

DISABILITY CERTIFICATE

Date 1-3-95

TO WHOM IT MAY CONCERN

I hereby certify that Ceasar Wright

Has been under my professional care and was:

Totally Incapacitated
Partially Incapacitated

From 2-18-92 To: 1-2-95
Remarks: May return to work on 1-2-95

full duty

Signed: H.L. Brilliant, M.D. [signature stamp]

S/H.L. Brilliant

EXHIBIT
B

STEVENS SHIPPING & TERMINAL COMPANY
STEAMSHIP AGENTS, CHARTERING BROKERS,
STEVEDORES, TERMINAL OPERATORS
1071 Morrison Drive
P.O. Drawer 1297
Charleston, SC 29402

January 11, 1995

International Longshoremen's Association
Local 1422
910 Morrison Drive
Charleston, SC 29403

Attn: Mr. Ben Flowers

Re: Caesar Wright - SSN 248-72-3878

Dear Ben,

It has come to our attention that Caesar Wright has returned to work although he was certified as permanently and totally disabled.

Both paragraph 13(D)(6) and paragraph 13(B)(1) permit the employers to determine whether an employee is "qualified" to perform job assignment. Once an individual is certified as permanently and totally disabled, he is no longer qualified to perform longshore work of any kind.

Accordingly, Mr. Wright is not eligible to be employed by this company.

Sincerely,
STEVENS SHIPPING & TERMINAL CO.
S/
W. J. Bean III
Stevedore Manager

EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT

LONGSHOREMEN'S AGREEMENT
BETWEEN THE
SOUTH CAROLINA STEVEDORES ASSOCIATION
AND THE
INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION
LOCAL #1422

1. This agreement was made and entered into on the 30th day of November, 1990 between the South Carolina Stevedores Association and its direct employer members, hereinafter known as the party of the first part and the South Atlantic & Gulf Coast District of the International Longshoremen's Association representing its subordinate Local No. 1422, hereinafter known as the party of the second part.

* * *

13.(A)(1) Longshore work is to cover all labor used in connection with loading or discharging ships, barges or other floating craft. It will include men engaged in handling cargo to or from point of rest or to or from cars or trucks when handled direct to or from ships. It will include all operators of mechanical equipment used in such operations, including cranes owned by Stevedore Contractors when qualified operators are available, provided, however, that this shall not require the Employers to alter any existing practices. When a Stevedore Contractor introduces new mechanical equipment he must endeavor to train men presently in the industry to operate such equipment. It will also cover sorting, coopering or reconditioning of cargo when performed in connection with stevedoring work; the handling of ships' stores when not carried by hand up the

gangway; the handling of baggage to and from ships' deck of passenger vessels, all mail, dunnaging (excluding bulk separations), rigging (excluding rigging for heavy lifts) and the following operations when vessel is alongside dock; cleaning of cargo areas aboard ship, lashing and securing cargo and the fitting and dismantling of fittings. It will also include gearmen (not mechanics) when assigned to ships; the operation of permanently mounted shipboard cranes and winches, and the handling of lines when performed by stevedores. It also includes opening and closing of hatches on conventional-type vessels with tween decks when working general cargo.

* * *

13.(B)(1) The Employer shall give due regard to the following factors:

1. Protecting the safety and health of all men employed in the operation.

2. Regulating stevedoring operations to best accomplish the safe, efficient and orderly movement of cargo.

3. Utilizing modern methods and equipment in the interest of avoiding unnecessary manual labor. Where this is implemented with the result that there will be a change in the operations the Employer will discuss his intentions in advance with the Union to enable both parties to agree on the most efficient operation.

4. Making the best use of skilled manpower in the light of the above consideration.

It is distinctly understood and agreed that the Union has the privilege of bringing to the attention of each Employer any practices which the Union feels are not in accord with the spirit of the foregoing. The Employers hereby agree to promptly investigate and give

careful consideration to all suggestions and recommendations from the Union in the light of the objectives set forth above. If such procedure still fails to satisfactorily dispose of any such questions, they shall be resolved through the arbitration procedure set forth in Clause 15.

* * *

13.(D)(5) Where hardship is claimed by Union and/or Management because of unreasonable or burdensome conditions or where work methods or operations materially change in the future, the problem shall first be discussed between the Local and Management involved. In the event an agreement cannot be reached, either party may refer the dispute to the Joint Negotiating Committee and if the matter cannot be resolved by that Committee, either party may then refer the question to an arbitrator in accordance with the procedure set forth in Clause 15(B).

13.(D)(6) There shall be no interference with the Employer's right to shift men from hatch to hatch, ship to ship, dock to ship or ship to dock so long as the number of men shifted from any gang does not reduce the Gang structure below the minimum required as determined by the class of cargo being handled by the gang. In no event shall men be shifted from any gang for the purpose of opening, closing and rigging a hatch to which the entire gang has not been assigned.

The Employer also reserves the right to hire and discharge. It is recognized that the Employer has the right to utilize men in any combination of job classification for which they are qualified, providing that they receive the pay rate of the highest job classification in which they are employed during their work shift.

13.(E) Neither party shall uphold incompetency, shirking of work, insubordination or the use of abusive language and personnel guilty of these offenses shall be dealt with as circumstances require. Persons guilty of misconduct offenses shall be dealt with as follows:

1. PILFERAGE

The I.L.A. Locals parties hereto agree to make every effort to prevent pilferage or broaching of cargo, and any person found guilty of such broaching, or pilfering or knowingly having broached or pilfered cargo in his possession, shall be disciplined as follows:

PENALTIES:

First Offense - Sixty (60) days suspension from work through any and all I.L.A. Hiring Halls covered under this Agreement.

Second Offense - Ninety (90) days suspension from work through any and all I.L.A. Hiring Halls covered under this Agreement.

Third Offense - Permanent suspension from work through any and all I.L.A. Hiring Halls covered under this Agreement.

2. VIOLENCE

(A) Display or Possession of Weapons

When anyone employed under the terms of this Agreement, or in the exercise of any official capacity under the terms of this Agreement, is found guilty of displaying or knowingly possessing a dangerous weapon at any facility normally considered a work place under this Agreement, the following penalties shall apply:

First Offense - Sixty (60) days suspension from employment through any and all I.L.A. Hiring

Halls and from acting in such official capacity under the terms of this Agreement.

Second Offense - Ninety (90) days suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Third Offense - Permanent suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

(B) Physical Assault With a Dangerous Weapon

Anyone employed under the terms of this Agreement, or in the exercise of any official capacity under the terms of this Agreement found guilty of deliberately physically assaulting another individual with a dangerous weapon at any facility normally considered a work place under this Agreement, shall be immediately and permanently suspended from employment through any and all I.L.A. Hiring Halls and such official capacity covered under the terms of this Agreement.

(C) Battery

"Battery" - When anyone employed under the terms of this Agreement or in the exercise of any official capacity under the terms of this Agreement is found guilty of beating or using physical violence on a person, without that person's consent, the following penalties shall apply:

First Offense - Sixty (60) days suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Second Offense - Ninety (90) days suspension from employment through any and all I.L.A. Hiring

Halls and from acting in such official capacity under the terms of this Agreement.

Third Offense - Permanent suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Offenses which occurred more than three (3) years prior to the date of an offense, shall not be considered in determining the appropriate misconduct penalty for the latest offense.

3. INTOXICATION

When anyone employed under the terms of this Agreement or in the exercise of any official capacity under the terms of this Agreement is found guilty of being intoxicated at any facility normally considered a work place or bringing intoxicants on the premises at any facility normally considered a work place under this Agreement, the following penalties shall apply:

First Offense - Sixty (60) days suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Second Offense - Ninety (90) days suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Third Offense - Permanent suspension from employment through any and all I.L.A. Hiring Halls and from acting in such official capacity under the terms of this Agreement.

Offenses which occurred more than three (3) years prior to the date of an offense, shall not be considered in

determining the appropriate misconduct penalty for the latest offense.

4. POLICY ON DRUGS (SEE APPENDED POLICY ON DRUGS)

5. ENFORCEMENT

An individual shall be subject to the penalties provided herein when found guilty of any misconduct charges listed above when his guilt is established by a forum properly constituted under Union By-Laws and/or Hiring Hall procedures, by a committee or arbitrator as provided under the grievance and arbitration procedures of this Agreement, or by a court of law or a governmental agency of competent jurisdiction.

Personnel suspended as a result of misconduct shall lose seniority and G.A.I. eligibility and benefits for the period of the suspension. Should any of the misconduct offenses occur in the Hiring Hall areas, it shall carry the same penalty as occurring at the work sites, and a committee of duly appointed or elected persons who work under the terms and conditions of this Collective Bargaining Agreement shall judge the guilt or innocence of persons charged with misconduct in the Hiring Hall area.

* * *

15.(A)(1) During the term of this Agreement, the Employer agrees that there shall be no lockouts of the members of the Union and the Union agrees there shall not be any strike of any kind or degree whatsoever, walkout, suspension of work, curtailment or limitation of production, slowdown, or any other interference or stoppage, total or partial, of the Employer's operation for any causes whatsoever; such causes including but not limited to unfair labor practices by the Employer or

violation of this Agreement. The right of employees not to cross a bona fide picket line is recognized by the Employer. The Union shall not be financially responsible for strikes or walkouts not authorized or assented to by the Union.

15.(A)(2) If the Administrator of any fund established under the terms of this Agreement determines that an Employer is delinquent in paying the requisite assessments, contributions, royalties or other required payments to the fund when due, he shall immediately notify the union party hereto with copy to the delinquent Employer. If within 7 days the Employer does not either convince the Administrator he is in fact not delinquent or pay the delinquent account, the Union will be released from its obligations under Clause 15(A)(1) to continue to work for that Employer and shall not dispatch personnel to that Employer until the delinquency is ended. The Employer shall be liable not only for the amount of the delinquency, but for attorney fees, auditing fees, court costs and all other related collection expenses. In the event of disagreement as to the applications of the above, the dispute shall be settled as a grievance under the procedure of Clause 15(B), but omitting the Port Grievance Committee and being referred directly to the District Grievance Committee.

15.(B) Matters under dispute which cannot be promptly settled between the Local and an individual Employer shall, no later than 48 hours after such discussion, be referred in writing covering the entire grievance to a Port Grievance Committee composed of one member from a company not involved in the dispute, the Port Employer member of the Joint Negotiating Committee, an the Port Union member of the Joint Negotiating Committee, and a Union member not involved in the previous attempts to settle the dispute. In the event this Port Grievance

Committee cannot reach an agreement within five days after receipt of the complaint, the written record of the dispute shall be referred to the Joint Negotiating Committee, which will function as a District Grievance Committee on the following basis:

There must be present at the Grievance Committee Meeting at least three (3) regular Employer members and three (3) regular Union members, in addition to the members from the port originating the dispute, as these latter members may participate in the discussion but may not vote. Each side shall have four votes, and if the fifth member of either side is absent he shall authorize his vote to be cast by one of the voting members in attendance. This Grievance Committee shall meet at least quarterly, and in the case of urgent matters it shall made every effort to meet as soon as possible.

A majority decision of this committee shall be final and binding on both parties and on all employers signing this Agreement. In the even the Committee is unable to reach a majority decision within 72 hours after meeting to discuss the case, it shall employ a professional arbitrator whose expense and fees, as well as those of any expert witnesses required by the arbitrator are to be borne jointly by the Management and the Union of the port concerned. Should the Committee be unable to agree on the selection of an arbitrator, they shall request the assistance of the Federal Mediation and Conciliation Service in designating a suitable arbitrator. Expenses of the Employer members of the District Grievance Committee are to be borne by the Port Employers, and of the Union Members of the district Grievance Committee by the I.L.A.

In the selection of an arbitrator, thought will be given to a person who is knowledgeable and familiar with the problems of the Longshore industry.

Any decision in favor of the employee involving monetary aspects or discharge shall require the employer involved to make financial restitution from the time of the complaint concerned, whereas decisions involving working methods or interpretations shall take effect seventy-two hours after being rendered.

15.(C) The above mentioned Joint Negotiating Committee shall consist of an Employer's side of five members, one each from Wilmington, North Carolina; Charleston, South Carolina; Savannah, Georgia; Jacksonville, Florida; Tampa, Florida; and a Union side of the I.L.A. representative from each of these ports.

Each Employer vacancy shall be filled by the port with the vacancy, and each Union vacancy by the Southeastern Dock and Marine Council of the of the I.L.A.

15.(D) The Joint Negotiating Committee upon written requests of any Employer signatory to this Agreement or any Local covered by this Agreement shall determine whether new commodities or new types of packing present hazards or discomfort in handling which make it necessary to add such items to now-existing penalty classifications. Such decisions shall be final and binding on all signatories to this Agreement, but where no majority decision is reached by the Committee, this shall constitute a denial of such addition.

15.(E) It is understood and agreed that there will be no changes made in this Agreement except by mutual consent in writing and with the full knowledge of all members of the Joint Negotiating Committee. All interpretations of this Agreement will be made in accordance with the provisions of Clause 15.

15.(F) The Union agrees that this Agreement is intended to cover all matters affecting wages, hours, and

other terms and conditions of employment and that during the term of this Agreement the Employers will not be required to negotiate on any further matters affecting these or other subjects not specifically set forth in this Agreement. Anything not contained in this Agreement shall not be construed as being part of this Agreement. All past port practices being observed may be reduced to writing in each port.

16. Both parties agree to cooperate with all efforts to provide safe working conditions including such efforts of the United States Department of Labor and of all Portwide Longshore Safety Councils and company safety programs. Where neither such Councils nor such company programs now exist, the parties shall cooperate in establishing one or the other, with meetings to take place at least quarterly.

The requirements of the Occupations [sic] Safety and Health Administration shall be binding on both Parties. All personnel reporting for work must be dressed so that no additional hazard is created and must wear safety shoes and hard hats.

It shall be mandatory that each port have a viable, actively working safety program. These programs will be administered by a Joint Committee of Management and Labor in each port and shall utilize the following general work rules; and also encompass safety and health matters arising under various statutes, including the Occupational Safety and Health Act.

GENERAL SAFETY RULES

The following general safety work rules shall be used as guide lines to set up each port safety program.

GENERAL CARGO

* * *

6. No worker shall be allowed to shape up or remain on the job if under the influence of drugs or alcohol or is not physically qualified to safely perform all work to which he is assigned.

7. A known epileptic will not be referred to work unless he obtains a physician's written certification on a periodic basis stating that he is receiving medication to control or stabilize his condition; that he has not had a seizure during the period the medication has been administered; that he will not, in all medical probability, be susceptible to epileptic seizures while on medication; and that his epileptic condition will not otherwise impair his ability to perform the tasks required of him.

* * *

17. It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law.

* * *

For the International	For the South Carolina
Longshoremen's Association	Stevedores Association
S/_____	S/_____
Benjamin Flowers President, ILA Local 1422	James P. Lamb Employer Representative

CHARLESTON LONGSHORE SENIORITY PLAN

To implement the employment of Longshoremen in the Port of Charleston, South Carolina, under a seniority system as required by the present Collective

Bargaining Agreement of I.L.A. Local 1422, the parties thereto hereby agree to the following:

1. The operation of the plan shall be governed by a Seniority Board composed of the President of I.L.A. Local 1422 and one representative appointed by the Membership of I.L.A. Local 1422, the Charleston Employers' Representative of the District Negotiating Committee and one representative chosen by the Employers who are party to the Charleston Longshore Agreement. Each member of the Board shall designate an alternate to serve in his absence.

2. Any dispute concerning or arising out of the terms and/or conditions of this Agreement, or dispute involving the interpretation or application of this Agreement, or dispute arising out of any rule adopted for its implementation, shall be referred to the Seniority Board.

a) The Seniority Board shall act by a majority vote, and should they reach determination in a particular dispute such determination shall be final and binding.

b) The Board shall hold meetings on the second Wednesday of each month unless there is no scheduled business. Special meetings may be held when necessary.

c) If the Seniority board shall be unable to reach a determination of a particular dispute, the dispute shall be submitted to a Committee of two for final determination. This Committee shall be composed of one individual chosen by I.L.A. Local 1422 and one individual chosen by the South Carolina Stevedores Association. The individuals chosen must be from outside the Charleston area and be active in the longshore industry in the South Atlantic or Gulf area.

d) The Seniority Board shall be a permanent body, and shall have sessions within one week after a

dispute or grievance arises.

e) The Seniority Board shall be the sole judge of the sufficiency of the evidence to be considered and the resolution of any dispute brought before it.

f) Any dispute or grievance brought by an individual employee must be submitted to the Board in writing at least forty-eight hours in advance and the complaint must be signed by the grievant.

g) The Board shall have authority to determine whether any of the rules listed herein have been violated and shall have power to evoke the penalties as provided under Paragraph Eight herein.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

1. Plaintiff, who was born on July 16, 1942, worked from 1970 through 1992 as a longshoreman in the Port of Charleston, South Carolina.

2. Plaintiff, while working for Defendant Shipping and Terminal Company on February 18, 1992, sustained a serious injury to his right heel, and an injury to his back. He did not work again until January 2, 1995.

3. Pursuant to the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 *et seq.*, Plaintiff pursued a claim for disability compensation. Defendant Stevens Shipping paid Temporary Total Disability benefits to Plaintiff until the end of September, 1993. At that time, relying on an opinion of Dr. Robert Lowery that Plaintiff could return to certain work as a longshoreman (driver transport, RORO; Tab 11 at 113), Defendant Stevens Shipping discontinued all disability compensation benefits to Plaintiff.

4. In April, 1994, Plaintiff was using a cane "most of the time," including when he attended exams by his treating physician, Dr. Howard L. Brilliant. Plaintiff testified that his right foot swelled if he stood "constantly for maybe an hour or two." (Tab 28 at 983 [p. 39]).

5. Plaintiff's compensation claim was set for hearing in May, 1994. Dr. Robert Lowery and a vocational consultant for Stevens Shipping believed that Plaintiff could return to longshore work, or to less demanding work as a cashier or counter clerk (Tab 8 at 102-8; Tab 11 at 112-13).

6. Dr. Brilliant did not believe that Plaintiff was able to perform any of the jobs that Dr. Lowery had approved for Plaintiff. Timothy Bryson, a vocational

consultant retained by Plaintiff's compensation attorney, did not believe that Plaintiff was capable of performing any of the jobs approved by Dr. Lowery (Tab 14 at 145), or any other competitive employment.

7. Plaintiff testified on April 28, 1994, that he would like to return to work as a longshoreman, but that his union would not refer him for work until his medical condition improved. (Lorberbaum Declaration at ¶4.)

8. Plaintiff had potential claims both for permanent total disability, if he were unable to return to any competitive gainful employment, and for permanent partial disability if his back injury combined with his foot injury to reduce his earning capacity. (Lorberbaum Declaration at ¶8)

9. If Plaintiff had been found to be totally and permanently disabled, his compensation benefit would have been $3,033.16 per month, based on the weekly compensation rate of $699.96. Plaintiff had an Average Weekly Wage preceding the accident of $1,591.05. If he had been found entitled to permanent partial disability, he could have earned up to $540 per week (more than $28,000 per year) and still have been awarded the same monthly compensation of $3,033.16, for permanent *partial* disability. Two of the three non-longshore jobs identified by the vocational consultant for Stevens Shipping were minimum wage jobs (Tab 8 at 107-8); none of the non-longshore jobs would have paid $20,000 per year.

10. Under the Longshore and Harbor Workers Compensation Act, Plaintiff could have collected periodic disability benefits, up to $3,033.16 per month, until his death. According to the stipulation to settle the compensation claim, Plaintiff's life expectancy was an additional thirty-three years, or 396 months (Tab 17 at 207).

11. Defendant Stevens Shipping decided to compromise Plaintiff's claim by paying to Plaintiff a total of $250,000, of which $123,604.96 was allocated, by agreement of the parties, to future indemnity as monthly disability benefits of $312.13, beginning October 1, 1994. (Tab 17 at 205-7; Lorberbaum Declaration at ¶¶7-8.) Attorney Lorberbaum's undisputed declaration states, "The future indemnity constituted a very modest settlement for Mr. Wright's claim for benefits for permanent partial disability, 33 U.S.C. §908(c)(21)."

12. No judicial finding or stipulation was made that Mr. Wright was permanently totally disabled. No judicial finding or stipulation was made that Mr. Wright would never be able to return to his prior work as a longshoreman. (See Decision and Order, Tab 18.) None of the settlement documents or discussions suggested that Plaintiff would be barred from returning to work for Defendant Stevens Shipping, or any other longshore employer. (Lorberbaum Declaration; Plaintiff's Declaration) In a recent Release for a workers compensation settlement of another employee, Defendant Stevens Shipping included a specific waiver of right to re-employment. (Declaration of James Brown and attachment.) No employer other than Stevens Shipping participated in Plaintiff's claim or Plaintiff's Settlement.

13. The settlement of the compensation claim stipulated that Temporary Total Disability benefits would be paid to Plaintiff through the end of September, 1994. Technically, Temporary Total Disability benefits are not to be paid after the employee reaches Maximum Medical Improvement.

14. During his convalescence, Mr. Wright also applied for Social Security Disability benefits, which were awarded by letter dated July 18, 1993 (Tab 24). To qualify for these benefits he was required to be disabled

for a period of at least twelve consecutive months; the Social Security Act and regulations do not require that a worker be permanently disabled in order to qualify for monthly disability benefits. Plaintiff continued to receive monthly disability benefits from Social Security throughout 1994.

15. After receiving his settlement in June, 1994, Plaintiff installed a whirlpool tub in his home to help his chronic back pain, and he began an exercise program at Lifequest, a health club, to strengthen his right leg. (Plaintiff's Declaration) He became able to walk without a cane, and was able to stand and walk for longer periods of time. His back pain resolved.

16. Dr. Brilliant, Plaintiff's treating physician, does not believe the exercise relieved the pain and swelling in Plaintiff's right foot. However, on January 24, 1995, Dr. Brilliant observed that a bony spike, which had been protruding from Plaintiff's ankle bone after the injury, had substantially "resorbed" into the ankle, which lessened Plaintiff's pain. (Brilliant dep. at 99, 113; Tab 34 at next to last page.) This resorption was not predictable, but it was not an unusual occurrence.

17. On January 2, 1995, Plaintiff returned to work as a longshoreman. He obtained a written release from his treating physician, Dr. Brilliant, that he could return to work without restrictions. Dr. Brilliant testified that, by this release, he intended to indicate that working without restrictions would not be medically harmful to Plaintiff. (Brilliant dep. at 89-90) At his deposition, Dr. Brilliant testified that Plaintiff could perform, without risk of injury to himself, the duties of all the jobs described in position descriptions prepared for Defendant Stevens Shipping (dep. at 101-10).

18. Plaintiff worked through January 11, 1995, as

follows (Tab 36 at 17-8, and pay stubs):

Date Worked	Employer	Position	Hours
01/02/95	Universal	Header	9.0
01/03/95	Ceres	Lasher	12.0
01/05/95	Universal	Header	10.0
01/06/95	Universal	Header	8.5
01/08/95	Universal	Header	9.0
01/09/95	Ryan-Walsh		9.5
01/10/95	Ceres	Hatchtender	10.5
01/11/95	Strachan	Holdman	9.0
Total hours			**77.5**

Plaintiff's Declaration reflects that he tolerated the required duties well and that he received no criticism or complaints during his employment. In response to Requests for Production (#14), defendants produced no documented criticisms of Plaintiff's work during this period of work.

19. Dr. Brilliant testified that Plaintiff still suffers a significant deformity in his right foot. By physical examination alone, Dr. Brilliant could not determine whether Plaintiff could tolerate longshore work on a regular basis. He recommended that Plaintiff do longshore work for a month, as an appropriate trial (dep. at 115).

20. The Social Security Act and regulations authorize a "trial work period" for up to nine months, while disability benefits are continued. Plaintiff reported his earnings from the period of his employment, January 2-11, 1995, to Social Security (Tab 25). Social Security acknowledged the report, and indicated that Plaintiff's claim would be reviewed from time to time to determine his continued eligibility (Tab 26).

21. The Collective Bargaining Agreement in this case does not make explicit reference to the Americans with Disabilities Act, nor to any other statute precluding discrimination in employment. Plaintiff is not a party to the Collective Bargaining Agreement.

22. When Plaintiff was denied employment by the defendants, his union officials did not recommend that he file a grievance; they recommended that he retain a private attorney. (Plaintiff's Declaration) He did so by January 26, 1995. (*Idem.*)

23. Defendants contend that, within 48 hours after Plaintiff learned that he was being refused employment, which was by January 12, 1995, he was required to grieve the refusal under the Collective Bargaining Agreement, and that his failure to file a grievance in that time bars all statutory claims of employment discrimination, including his claims under the Americans with Disabilities Act. (Tab 33) When Plaintiff served notice of his administrative charges of discrimination, none of the defendants demanded, requested, or suggested that the dispute should be grieved or arbitrated.

24. South Carolina is recognized by the Equal Employment Opportunity Commission as a state in which state statutes provide a remedy for discrimination against handicapped individuals or individuals with a disability, within the meaning of 42 U.S.C. § 2000e - 5(e).

25. Administrative charges fully stating all elements of a claim of discrimination on the basis of disability or perceived disability, executed under oath and under penalties of perjury by Plaintiff against all defendants, were received by facsimile transmission by the EEOC on July 7, 1995, and earlier as to three defendants. (Tab 37 at 621-22, 645-46, 610-11; Ray Declaration and attachments)

MOTION TO COMPEL ARBITRATION WITH SUPPORTING AUTHORITIES (AND JOIN ADDITIONAL PARTY)

Now comes Plaintiff above-named, by his undersigned counsel, and respectfully requests that this Honorable Court enter an Order compelling Defendants to submit to arbitration of the grievances attached here to, including claims under the Americans with Disabilities Act, relating to the employment of Plaintiff Ceasar Wright by any of the Defendants herein; and, if necessary or appropriate, to enter an Order pursuant to Rules 19, 20 and 21, FRCP, joining the International Longshoremen's Association and Local 1422, International Longshoremen's Association, as parties to this action for the purpose of addressing the issue of arbitration under the Collective Bargaining Agreement.

As GROUNDS for the foregoing relief, Plaintiff would show the following:

Policy Considerations Supporting the Motion

1. Plaintiff's primary objective is to have his statutory claims of discrimination heard on the merits. Defendants' primary objective appears to be to prevent the claims from being heard on the merits. Equity, justice, and the policies of federal law strongly support plaintiff's objective.

2. As this Court has construed the decision in *Austin v. Owens-Brockway*, 78 F.3d 875 (4th Cir.), *cert. den.*, 65 U.S.L.W. 3351, 3353 (Nov. 12, 1996), plaintiff must submit his statutory claims of discrimination to the arbitral forum. However, as pointed out in Plaintiff's Motion for Reconsideration, Defendants now refuse to allow the arbitral forum to address the merits.

3. The inequities of Defendants' position are

clear. As Judge Hall pointed out in his dissent in *Austin*, the Supreme Court's decisions prior to January 15, 1995, gave no hint that Plaintiff would be required to submit his statutory claims of discrimination to the union's arbitral forum. Plaintiff timely preserved all his statutory rights under the procedures recognized at the time.

4. If the new rule of the *Austin* decision is to be applied to Plaintiff's claim, the very least this Court should do, as a matter of equity, is to apply tolling doctrines to preserve the claims from being time-barred, and direct that the claims now be heard on the merits in the arbitral forum.

Addition of Union as a Party

5. Counsel for Defendants has advised of his position that such relief cannot be granted without the union being a party. The Court has the authority to add the union (the International and the Local Union, if appropriate) as party to this action, if the union is either a necessary party (Rule 19, FRCP[)], or an appropriate party (Rule 20, FRCP)). The party, under Rule 21, FRCP, can be added "at any stage" of the litigation, even on appeal. *Reed v. Robillo*, 376 F.2d 392 (6th Cir. 1967); 7 Wright & Miller, Federal Practice & Procedure: Civil, §1688 (1972).

Facts Shown in Exhibits Relating to Arbitration

6. Plaintiff worked for several defendants in the period January 2 - 11, 1995. Thereafter, defendants agreed to refuse to accept Plaintiff['s] services.

7. Plaintiff's union, Local 1422, International Longshoreman's Association, filed a timely grievance of the denial of employment. See Exhibits 2, 3, 4, January 12, 1995. However, when this grievance was not resolved, the union recommended that Plaintiff pursue his statutory

remedies under the Americans with Disabilities Act (ADA) rather than immediately arbitrating the grievance.

8. On or about April 19, 1996, Plaintiff's counsel offered to submit the ADA claims to arbitration, providing the union consented, reserving the parties' respective positions as to the effect of such arbitration. See Exhibit 7.

9. Defendants, through counsel, declined to submit the ADA claims to arbitration. See Record, Tab 33, dated April 22, 1996 (Exhibit 8). Defendants take the position that the period for demanding arbitration was not tolled by timely filing of administrative charges and this suit.

10. On or about July 8, 1996, Plaintiff again presented himself for work at defendants Stevens Shipping Company and Universal Maritime, respectively. Plaintiff's services were again rejected.

11. Plaintiff then filed a timely grievance dated July 9, 1996. See Exhibit 9.

12. Defendants Stevens and Universal have refused to address the grievance on the merits, as set forth in their response, dated July 12, 1996, to the initial grievance. (Exhibit 10.)

13. Plaintiff's union, Local 1422, then demanded further grievance proceedings, by letter dated July 22, 1996. See Exhibit 11. Plaintiff is informed and believes that no further proceedings have taken place.

14. Plaintiff's counsel promptly sought copies of the documents relating to the latest attempt to grieve Plaintiff's claims, in order to present the matter to the Court. See Exhibit 12, letter dated July 29, 1996. However, no response was received until on or about November 25, 1996. (See letter from Benjamin Flowers,

dated November 21, 1996, Exhibit 14).

Conclusion

15. The Fourth Circuit's decision in *Austin* constitutes a major change in the "rules of the game" for enforcing the statutory rights of employees who work under union collective bargaining agreements. There are numerous policy questions that the Courts will eventually have to resolve, if *Austin* is extended, as this Court has indicated it should be, to all collective bargaining agreements (not just those agreements, like *Austin*, that adopt the statutory obligations of non-discrimination as contractual obligations). For example, since unions control access to arbitration, the focus of non-discrimination litigation could be directed to hundreds or thousands of "duty of fair representation" cases, bringing both unions and employers before the federal courts, with the major financial responsibility for unlawful discrimination falling not on the bad actor (the employer) but on the union for failing to enforce statutory rights. See, e.g., *Bowen v. U.S. Postal Service*, 459 U.S. 212 (1983). It is easy to see why defendants assert such a rule, but it is questionable whether DFR cases are the best means to enforce national policies against discrimination in employment.

16. Given the radical change in the "rules of the game" reflected in *Austin*, the Court, in equity and good conscience, should apply principles of equitable tolling and require the defendants to submit to arbitration the merits of Plaintiff's statutory claims of discrimination.